

### **REMARKS**

Claims 1-40 were pending in this case. Upon entry of this Amendment, Claims 3 and 11 will be cancelled, new Claim 41 will be added, leaving Claims 1-2, 4-10, and 12-41 pending in the case.

Applicants acknowledge with appreciation that Claims 17-21, 23-29, 31-37, 39 and 40 are allowable. Applicants also acknowledge with appreciation that Claims 3, 5, 7, 8, 11, 13, 15 and 16 are indicated as being allowable but for their dependence upon a rejected base claim.

The Office Action rejects Claims 6, 14, 22, 30 and 38 under 35 U.S.C. Section 112, second paragraph for the use of the phrase "general formulas". Applicants have amended Claims 6, 14, 22, 30 and 30 to remove the phrase and the more properly claim the compounds of the Formula (I), (II) and (III) as a Markush grouping. With this amendment, it is believed the rejection under 35 U.S.C. Section 112, second paragraph is overcome.

Claims 1, 2, 4, 9, 10 and 12 stand rejected under 35 U.S.C. Section 102(b) as anticipated by or in the alternative as obvious over the CABA abstract 78:64467 for the reasons of record.

Applicants reiterate their entire response in the prior Amendment here, with particular emphasis on discussion regarding non-obviousness, as the remarks of this Amendment will concentrate on the inherency issue emphasized in the July 31, 2002 Office Action to which this Amendment responds. Although the Examiner focuses on an inherency argument, there is absolutely no reliable indication from the CABA abstract alone (or the other references alone or in combination with it), that the desired inhibited growth of microorganism in a pesticide solution was either inherent or was recognized by the art of record.

Per the prior Office Action, the CABA Abstract discloses 0.6 % vofasteril with 7-10% of copper sulfate. The Office Action makes the assumption that vosateril is 34% peracetic acid, hence concludes that the disclosed 0.6% concentration is approximately 0.2% peracetic acid per the prior Office Action. Thus, according to the prior Office Action, there is disclosed a solution of 0.2% peracetic acid with 7-10% copper sulfate, arguing that the CABA abstract teaches:

7-10% copper sulfate

0.2% peracetic acid = peracetic acid/hydrogen peroxide/water in equilibrium

which the Office Action alleges must have inherently possessed microbicidal activity of the present invention.

Applicants respectfully note what leaps of logic the Office Action is making in concluding that the CABA Abstract -- directed to determining the sensitivity of *T. faviforme* to various disinfectants -- teaches the process of Claim 1 (as it stood prior to this amendment).

First, aside from this CABA reference, the undersigned found no use or definition of the term "vofasteril" on internet using the Google search engine and the search term "vofasteril". Nor was "vofasteril" found in the specifications of the U.S. Patent Office dating back to 1790, or in any of the chemical dictionaries or other references in the undersigned's library.

The undersigned was able to find the term "**W**ofasteril®" using the Google search engine on the Internet, which is apparently a registered trademark of Kelsa Pharma Wofen, Gbmh of Greppin, Germany or may be the trademarked product of LKV Agro animal service GmbH of Halle, Germany, among others. The undersigned could find no registered U.S. trademark for "Wofasteril". The search of the internet using the Google search engine with the search term "wofasteril" retrieved several entries showing differing compositions having differing concentrations of peracetic acid, some with and without acetic acid and some with and without stabilizers. At the web pages

"[www.kelsa.de/e\\_wst.htm](http://www.kelsa.de/e_wst.htm)" and

"[www.lkv-ats.de/produkte/shop/wofasteril.htm](http://www.lkv-ats.de/produkte/shop/wofasteril.htm)"

it appears that Wofasteril might be a trademark or trade name, and that many products are sold in many concentrations, and in many formulations under the name or mark of Wofasteril. Even the Kelsa web page referred to above admits that stabilizers are added, and depending upon what stabilizer and its concentration, it is possible that the "inherent" properties might differ widely!

Thus, instead of, for example, finding a reference that teaches/discloses a chemical composition which each component clearly identified by its chemical name

or structure, with each component's proportion set forth so one would know clearly what was in one's composition and what properties it would have, the Office Action has found only a reference to a trade marked product whose configuration can vary widely, which may be available from more than one company and may differ widely from what is offered today versus what was offered under the mark/name by whoever owned it in 1977 when lovchev et al were doing their work. Therefore, it is impossible to say with any certainty what was in the lovchev et al composition when lovchev et al combined Wofasteril®" (if indeed their vofasteril =s Wofasteril®") with copper sulfate. **Because its composition cannot be known with any degree of certainty, it is equally impossible to predict what properties the lovchev et al composition would have "inherently" had or not had!** The Office Action asks how can it be that the peracetic acid + hydrogen peroxide + water from "vofasteril" combined with a known fungicide would not exhibit the properties of the present invention. The real question is how could it possibly be known, when working with a trademark or a trade name from 1977, where the product configuration can vary widely and may be available from more than one manufacturer --- just what was in the lovchev et al., composition to determine what "inherent" properties it had, let alone whether those were the same properties as in the present invention! How can one, without even knowing what any added components were, determine what effect there would have been on any "inherent properties" by the added components for a given particular formulation of Wofasteril®. It is not even clear if the equilibrium that the Office Action alleges is present to produce a peracetic acid/hydrogen peroxide/water combination occurs in lovchev et al.,'s composition because additives can affect the equilibrium. As pointed out in the Block reference at page 176 second column, if fortified with acetic acid and hydrogen peroxide, or if a stabilizer is employed, the reverse reaction may be prevented entirely. Thus without knowing what is in lovchev et al's particular formulation of Wofasteril, one cannot say what exists in equilibrium in the solution nor can one say what inherent properties it had.

Also, in the prior Office Action, it is concluded that lovchev et al had a 0.2 percent concentration of peracetic acid. There is no explanation of the calculation or reasoning that led to this conclusion. It is not at all clear what is mean in the CABA abstract by the phrase "1% vofasteril (34% peracetic acid)". Does it mean that 1% of

Mo5137 - 10 -

that formulation of Wofasteril® had 34% peracetic acid, or did it mean that Wofasteril® is 34% peracetic acid and that a composition was made of 1% Wofasteril®, 1.62% perfumaric acid and 1% laural sulphate and 5% fossiasept were blended? Still further, with respect to the second half of the abstract, if vofasteril meant Wofasteril®, is that the same 34% peracetic acid formulation as identified earlier in the abstract or not (34% peracetic acid is not repeated in the 6th line of the abstract) and does the abstract mean to say that a composition comprising 0.6% Wofasteril® was blended with 7-10 percent of copper sulfate? Are the percentages by weight or by volume? How could one calculate with certainty that the final solution was 0.2% peracetic acid not knowing what was the actual make up of the Wofasteril® and what the percentages actually meant? Further, even if the a composition was made which was 0.6% Wofasteril® in combination with 7-10% copper sulfate, and even if Wofasteril is 34% peracetic acid, there is no discussion of what formed the balance of the composition in the abstract, and therefore it could have been anything. Also, the present specification defines a pesticide solution as a homogenous mixture of small solid particles of pesticide suspended in a liquid medium...how does one know from the CABA abstract whether the copper sulfate meets this definition.

In short, it is simply too large a leap to say that this 1977 six line abstract contains enough information to know what was in its composition and therefore to even hazard a guess as to what inherent properties it had in order to conclude that it anticipates the present invention or renders it obvious.

And even if were known with certainty what lovchev et al., had in their beakers, the Examiner has not shown that the disassociation of peracetic acid did in fact occur in the lovchev et al solution, and if it did, that it would in any way approach the concentrations of peracetic acid, hydrogen peroxide and water set forth in original claim 3 (now incorporated into amended Claim 1) of the present invention.

Further, even if it could be fairly argued that lovchev et al made a defined composition whose inherent properties were the same as the present invention, which Applicants contest, it would at most have been an accidental unrecognized anticipation of the present invention. lovchev et al was trying to test disinfectants on T. faviforme. lovchev et al was not concerned with trying to prevent the formation of Mo5137

microorganisms in a pesticide solution. There is absolutely no discussion of that concept in the six line CABA abstract. While it is a maxim that a compound and its properties are inseparable, it must be the case that the property is necessarily present (it cannot be "probably" present), and the failure to appreciate an invention does not render the invention anticipating. The C.A.F.C. recently spoke on this issue in the case of Roscoe Inc. v. Mirror Lite Co., 64 U.S.P.Q.2d 1676 (C.A.F.C. September 24, 2002),

"We disagree. Under the doctrine of inherency, if an element is not expressly disclosed in a prior art reference, the reference will still be deemed to anticipate a subsequent claim if the missing element "is necessarily present in the thing described in the reference and would be so recognized by persons of ordinary skill..."Inherent anticipation requires that the missing descriptive material is 'necessarily present', not merely or probably present in the prior art". [string cite follows]

There is no conception or reduction to practice where there has been no recognition or appreciation of the existence of the invention. [string cite follows]

Having explained the foregoing, Applicants have nonetheless, not for reasons of patentability but simply in an effort to advance prosecution of the case, amended Claim 1 to include the limitations of Claim 3, which the Office Action indicated would render Claim 1 (and therefore by extension Claims 2 and 4) allowable. Claim 9 has been similarly amended to add the limitations of Claim 11, which the Office Action indicated would render 9 (and therefore by extension Claims 10 and 12) allowable. Thus it is believed that the rejection of Claims 1, 2, 4, 9, 10 and 12 under 35 U.S.C. Section 102 (b) has been overcome.

However, Claim 41 has been newly added, which is identical to Claim 1 as Claim 1 was originally filed to determine if the Examiner will agree with the foregoing discussion and will allow Claim 41.

Although the Office Action did not require it, Applicants have amended Claims 4, 12, 20, 28 and 36 to provide proper antecedent basis for the term "pesticide" appearing in those claims.

Other amendments have been made to claim the present invention in more varied scope.

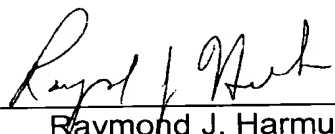
Applicants respectfully suggests that the present invention is a useful, novel unobvious advance over the art. In light of the foregoing remarks, review and reconsideration and allowance of the claims are respectfully requested.

Applicants note that a Supplemental Information Disclosure Statement was filed in this case on August 2, 2002, which was clearly after the July 31, 2002 mailing date of the latest Office Action. A copy is attached hereto for the Examiner's convenience.

Also, while the undersigned supports the Statement under 37 C.F.R. 1.97(e) in the August 2, 2002 Supplemental Information Disclosure Statement, Applicants request that the Examiner instead charge the fee for submitting an Information Disclosure Statement after the first Office Action and before the final Office Action, to Deposit Account No. 50-2510. Applicants simply prefer to pay the fee rather than rely upon the 1.97(e) statement.

Applicants request that Examiner remember to provide an executed PTO Form 1449 with the next Office Action or Notice of Allowance for this Supplemental Information Disclosure Statement.

Respectfully submitted,

By   
Raymond J. Harmuth  
Attorney for Applicants  
Reg. No. 33,896

Bayer CropScience  
100 Bayer Road  
Pittsburgh, Pennsylvania 15205-9741  
(412) 777-8366  
FACSIMILE PHONE NUMBER:  
(412) 777-8363

/jme/RJH/RH0085

**VERSION MARKED TO SHOW CHANGES**

**IN THE CLAIMS:**

Please cancel Claims 3 and 11, amend the claims as follows and add new Claim 41:

1. (Once Amended) A process for inhibiting the growth of microorganisms in a pesticide suspension, comprising the step of:

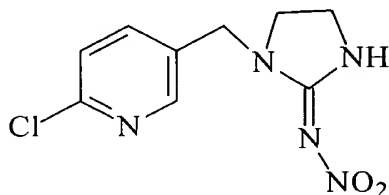
adding an effective amount of a biocide combination ~~of peracetic acid, hydrogen peroxide, and water to the pesticide suspension~~ to a pesticide suspension,

wherein said biocide combination comprises from about 3.0% to about 7.0% by weight of peracetic acid, from about 19.0% to about 25.0% by weight of hydrogen peroxide, and from about 68% to about 78% by weight of water, wherein the total composition by weight of said biocide combination is 100%..

4. (Once Amended) The process of Claim 1 or 2 wherein the pesticide suspension comprises a pesticide ~~is selected~~ from the group consisting of an insecticide, a herbicide, and a fungicide.

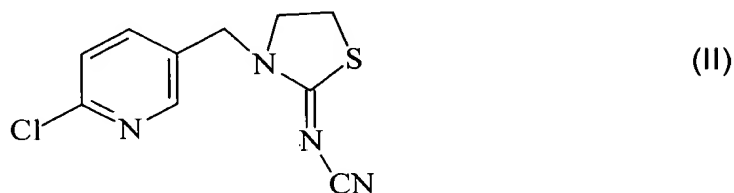
6. (Once Amended) The process of Claim 4 wherein the insecticide is a compound ~~selected from the group consisting of the following general formulas~~

a compound represented by the formula (I); (II) and (III).

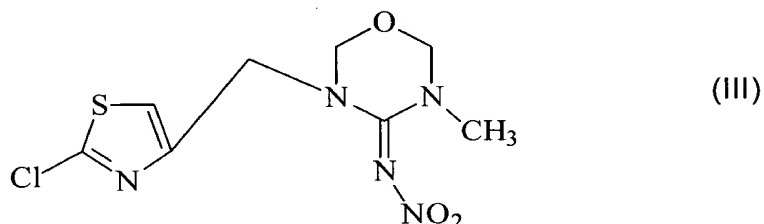


(I)

a compound represented by the formula (II)



and a compound represented by the formula (III)



9. (Once Amended) A process for inhibiting the growth of microorganisms in a pesticide suspension within a container that contains the pesticide suspension, the pesticide suspension including a pesticide suspended in a liquid medium comprising the steps of:

applying an effective amount of a biocide combination of peracetic acid, hydrogen peroxide, and water to one or more interior surfaces of a container wherein the pesticide suspension is contained within the container, which one or more surfaces contact a pesticide suspension when said pesticide suspension is contained within said container; and

introducing said pesticide suspension into said container, whereupon said pesticide suspension contacts said one or more interior surfaces having said biocide combination applied thereon;

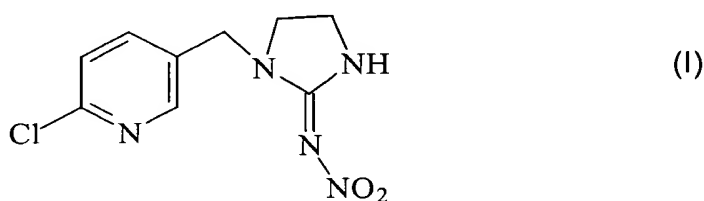
wherein said biocide combination comprises from about 3.0% to about 7.0% by weight of peracetic acid, from about 19.0% to about 25.0% by weight of hydrogen peroxide, and from about 68% to about 78% by weight of water, wherein the total composition by weight of said biocide combination is 100%.



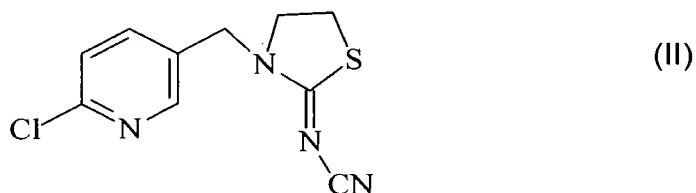
12. (Once Amended) The process of Claim 9 or 10 wherein the pesticide suspension comprises a pesticide is selected from the group consisting of an insecticide, a herbicide, and a fungicide.

14. (Once Amended) The process of Claim 12 wherein the insecticide is a compound selected from the group consisting of ~~the following general formulas (I), (II), and (III).~~

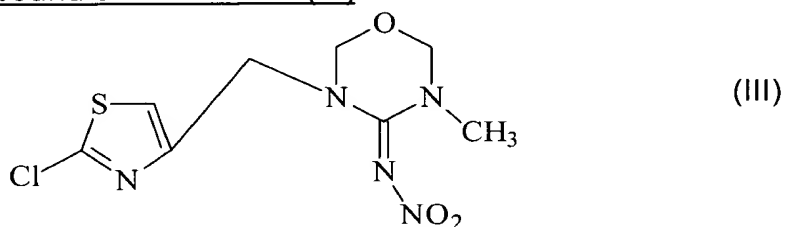
a compound of the formula (I)



a compound of the formula (II)



and a compound of the formula (III)



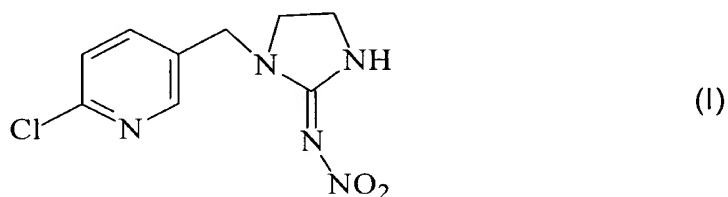
17. (Once Amended) A process for inhibiting the growth of microorganisms in a pesticide suspension, comprising the step of applying aan effective amount of a biocide combination of peracetic acid, hydrogen peroxide, and water to a surface wherein the pesticide suspension is in contact with the surface.

19. (Once Amended) The process of Claim 17 or 18 wherein the biocide combination comprises from about 3.0% to about 7.0% by weight of peracetic acid, from about 19.0% to about 25.0% by weight of hydrogen peroxide, and from about 68% to about 78% by weight of water, wherein the total composition by weight is 100%.

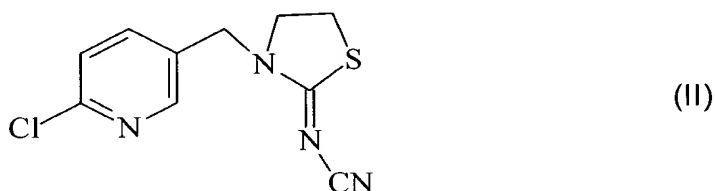
20. (Once Amended) The process of Claim 17 wherein the pesticide suspension comprises a pesticide is selected from the group consisting of an insecticide, a herbicide, and a fungicide.

22. (Once Amended) The process of Claim 20 wherein the insecticide is a compound selected from the group consisting of the following ~~general formulas (I), (II) and (III).~~

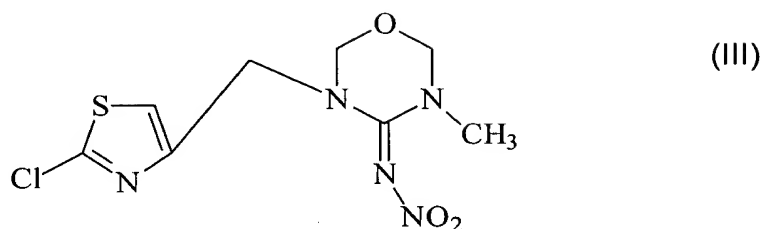
a compound of the formula (I)



a compound of the formula (II)



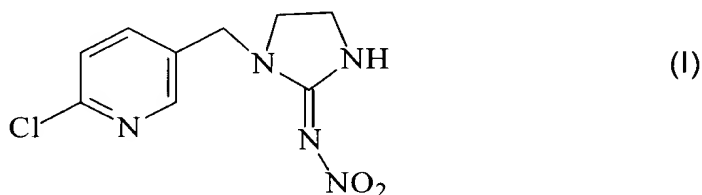
and a compound of the formula (III)



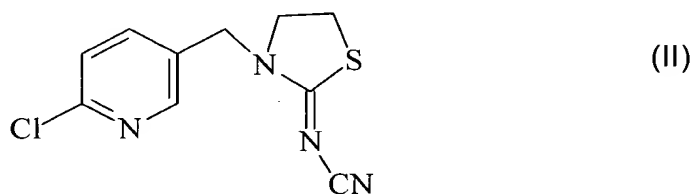
28. (~~Newly Added~~Once Amended). The process of Claim 25, 26 or 27 wherein the pesticide suspension comprises a pesticide is selected from the group consisting of an insecticide, a herbicide, and a fungicide.

30. (~~Newly Added~~Once Amended) The process of Claim 28 wherein the insecticide is a compound selected from the group consisting of ~~the following general formulas (I), (II), and (III).~~

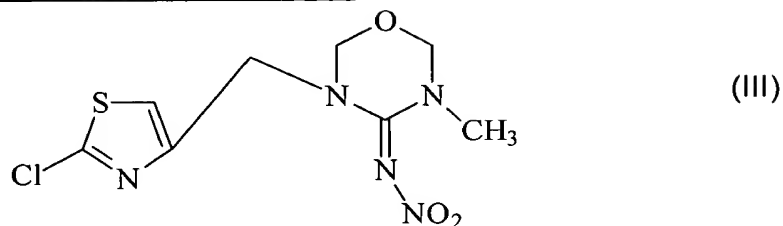
a compound of the formula (I)



a compound of the formula (II)



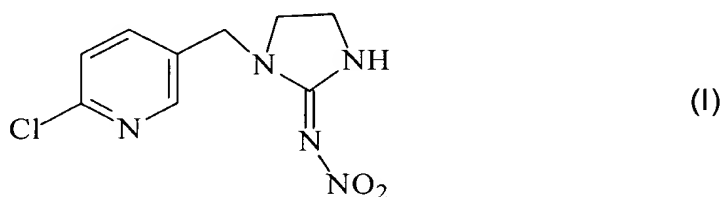
and a compound of the formula (III)



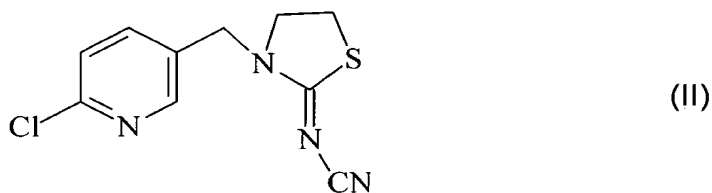
36. (~~Newly Added~~Once Amended). The process of Claim 33, 34 or 35 wherein the pesticide suspension comprises a pesticide is selected from the group consisting of an insecticide, a herbicide, and a fungicide.

38. (~~Newly Added~~Once Amended) The process of Claim 36 wherein the insecticide is a compound selected from the group consisting of the following general formulas (I), (II) and (III).

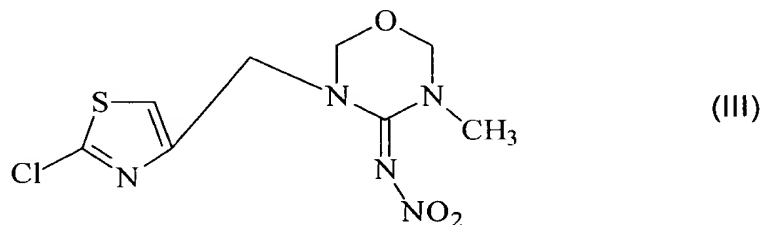
a compound of the formula (I)



a compound of the formula (II)



and a compound of the formula (III)



41. (New) A process for inhibiting the growth of microorganisms in a pesticide suspension, comprising the step of adding a biocide combination of peracetic acid, hydrogen peroxide and water to a pesticide suspension.